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"Significant Mineral Resources" — What Are They and How Do They Affect Local Land Use Regulation?

*By Derek Cole**

"The Legislature hereby finds and declares that the extraction of minerals is essential to the continued economic well-being of the state and to the needs of society . . . ."

So begins California's Surface Mining and Reclamation Act, or "SMARA," as it is commonly known. Those familiar with SMARA probably think of that act as strictly a mine reclamation law—one that deals with the process of restoring mined land following the conclusion of mining. But, SMARA also serves another purpose. To address the economic and societal needs recognized in the quoted finding, it requires cities and counties to conserve "significant mineral resources" within their jurisdictions. In this mineral conservation role, SMARA mandates that cities and counties adopt general plan policies to protect important mineral resources and requires special findings whenever they consider land use applications on, adjacent to, or nearby those resources.

Few municipal attorneys have probably had to deal with SMARA or its mineral conservation provisions, but this is likely to change. Issues concerning mineral resources are bound to become more prominent in the coming years, as California faces looming shortages in its long-term supply of certain minerals. According to a 2002 California Geological Survey study, the State's existing aggregate mining operations—those that produce sand, gravel, and rock for all types of construction (known as "aggregate")—will only be able to meet 56% of the 50-year demand for urban areas the State has classified.[1] California will, therefore, need to permit several new mining operations just to supply the more than 12 billion tons of aggregate it will need during the next half-century. The most likely locations for these operations will involve "significant mineral resources," areas that the State has determined to be of high mineral exploitation value through special classification and designation processes.

To assist those who will have to advise the municipalities that will deal with the increasing number of land use matters involving those resources, this article explains the responsibilities SMARA imposes on cities and counties to protect the resources and to promote mineral conservation. To provide a complete understanding of the subject, this article also describes the classification and designation processes that trigger those responsibilities.

Before addressing those topics, though, it is useful to understand why SMARA's mineral conservation provisions exist. For that, one need look no further than to the Act's legislative history.

A "COLLISION COURSE"

Minerals are essential to our standard of living. They are involved in, or make up,

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almost everything we do or use. Aggregate is a prime example: it supplies the raw material for every type of construction, including highways, roads, houses, hospitals, schools, and public buildings.

Yet, as essential as it is, aggregate is also in diminishing supply. Due to urban development, the ability to exploit many high value aggregate lands has already been forever lost. Indeed, as one report notes, "Aggregate mineral resources that would have been adequate to meet the needs of [the San Francisco, Los Angeles, and San Diego metropolitan regions] for thousands of years have been urbanized to the extent that the remaining available supplies in some regions are now sufficient only for a few decades . . . ."[2]

Although this threat of urbanization is reaching an acute stage today, it is by no means a new phenomenon. Recognizing the threat nearly 40 years ago, the Legislature commissioned a special panel in 1967 to explore urbanization's impact on mineral resources and to make recommendations for dealing with the problem. The chair of this panel, known as the Surface Mining Committee, aptly summarized the threat faced then as follows: "Recognizing that increase in population inevitably means increasing urbanization, and recognizing too that increase in our standard of living inevitably places increasing demands on the mineral industry, it is to be expected that in some places these two developments are likely to find themselves on a 'collision course.'"[3]

After several public hearings and lengthy analysis, the Surface Mining Committee identified the threat posed by this collision course as a "serious one" and concluded that significant policy changes were necessary to prevent further collisions between urban and mineral uses. Cutting to the heart of the problem, the Committee found that:

> Local land-use planning control in some instances has been carried out by local planners and officials without recognition of the existence or value of mineral-resource sites or of the importance of such minerals to the State, to nearby regions, or even to the locality itself. This disregard can be explained in part, by the paucity of information available to local planners and officials on mineral deposits, on market demands for them and on conservation plans and policies.[4]

To address these problems, the Surface Mining Committee recommended that there be a "fundamental State policy toward conservation of mineral resources." This policy, it added, needed to emphasize the identification of important mineral resources, require the incorporation of mineral resource information into city and county general plans, and mandate that those agencies adopt special measures to protect mineral resources for future development.[5]

After the release of the Committee's report in 1970, it took a few years for these proposals to become law. Ultimately, however, the proposals were adopted into the 1975 legislation that became SMARA, which took effect in January 1976.

Today, it is ironic that SMARA is known almost exclusively for its other function, mine reclamation. While this is no doubt because reclamation has received far more attention since SMARA's adoption, SMARA's legislative history makes clear that the concern about the impact of urbanization on mineral resources—as expressed nearly four decades ago—was the principal reason for the act's existence.

MINERAL LAND CLASSIFICATION

As the Surface Mining Committee recognized, a principal reason why cities and counties had failed to protect mineral resources was because they had lacked the resources and information necessary to identify them. SMARA's mineral conservation provisions address this shortcoming through a process known as "mineral land classification." Utilizing the expertise of the State Geologist and California Geological Survey ("CGS"), the Act generates mineral information for cities and counties by requiring the State to identify "significant mineral deposits" in "areas within the State which are urbanized or are subject to urban expansion or other irreversible land uses which would preclude mineral extraction."[6]

This classification process involves both geologic and economic analyses. As part of its geologic analysis, CGS staff reviews geologic and mining-related literature, compiles geologic maps, plots reported mines and prospects, and engages in field work and surveying. It then applies economic factors to determine if an area under study is "mineable, processable, and marketable under the technologic and economic conditions that exist at present or which can be estimated to exist in the next 50 years."[7] Areas meeting that criterion are then evaluated for their economic significance. For aggregate, a mineral deposit is considered a significant mineral resource if its total value exceeds $15,400,000 in 2005 dollars.

After conducting these geologic and economic analyses, CGS places the areas under study into classifications corresponding to their significance, which it reports in documents called "mineral land classification reports." Areas meeting all of the criteria for significance—thus triggering the city and county responsibilities discussed below—are classified "MRZ-2." Areas where CGS has determined there are no significant deposits are classified "MRZ-1." "MRZ-3" areas are those areas where there is either a moderate potential for the discovery of economic deposits or it is at least plausible that such deposits exist. Areas where knowledge of the significance of the deposits is inconclusive are classified "MRZ-4."

DESIGNATION OF SIGNIFICANT MINERAL RESOURCES

Following the assignment of the MRZ-2 classification to an area, the State Mining and Geology Board ("SMGB") may take the additional step of designating the area as either a significant regional or significant statewide mineral resource. These areas are those that the SMGB determines "to contain a deposit of minerals, the extraction of which is judged to be of prime importance in meeting future needs for minerals" in a particular region or the state and that, "if prematurely developed for alternate incompatible land uses, could result in permanent loss" of the deposit.[8]

The SMGB must hold a public hearing before designating an area as a significant mineral resource.[9] Before designating an area, it must also seek the recommendations of federal, state, and local agencies and other interested organizations in considering whether to assign the designation.[10]

If the SMGB chooses to designate a particular area, it must do so through a formal designation report indicating:

> the reason for which the particular area designated is of significance to the state or region, the adverse effects that might result from premature development of incompatible land uses, the advantages that might be achieved from extraction of the minerals of the area, and the specific goals and policies to protect against the premature incompatible development of the area.[11]

Along with the mineral land classification report, the designation report provides cities and counties the information they need to comply with the mineral conservation requirements of SMARA.

CITY AND COUNTY RESPONSIBILITIES

After areas within their jurisdictions have been classified or designated, cities and counties must comply with a number of requirements for conserving the area. These requirements can be broken down into two types: policy level and project level. At the policy level, cities and counties must adopt "mineral resource management policies" and incorporate those policies into their general plans. At the project level, they must make special findings whenever they consider land use applications that either "threaten the potential" to extract from the mineral lands or that involve the mineral lands themselves.

Policy-Level Requirements

Whenever areas within their jurisdictions are classified or designated, cities and counties must adopt mineral resource management policies emphasizing conservation of those areas.[12] Cities and counties must include these policies in their general plans—usually in the conservation elements—and must have the SMGB certify the policies.[13] The policies must (1) recognize mineral classification information, either by summarizing it or by incorporating it by reference; (2) refer—graphically, with maps, and through narrative text—to the locations of identified mineral deposits and locations where future mineral extraction may occur; and (3) provide statements of policy emphasizing the conservation and development of mineral deposits the classification process has identified.[14]

In addition to these general plan requirements, cities and counties must also do at least one of the following: (1) place the mineral resource areas into zoning or overlay districts that identify the presence of the identified mineral deposits and that restrict incompatible development; (2) record notices of the presence of identified mineral deposits on property titles in affected areas; or (3) require mitigation through general plan conditions on surrounding land uses that would be incompatible with mining.[15]

Project-Level Requirements

Cities and counties must also conserve mineral resources by making special findings whenever they consider certain land use applications that might affect the mineral resources. These applications include those concerning land use projects that would "threaten the potential to extract" from the resources and those "involving" the resources themselves. The specific findings required depend on which type of application is being considered.

Land Use Applications That "Threaten The Potential"

As discussed above, a principal reason for SMARA's existence was the Legislature's concern that urbanization would swallow up the mineral lands needed to meet the State's long-term mineral demand. For that reason, SMARA does not stop at the policy level in requiring cities and counties to conserve significant mineral resources. It also operates at the project level, mandating that they give special consideration to classified and designated mineral resource areas whenever considering projects that "would threaten the potential to extract minerals" from those areas.[16]

Unfortunately, because SMARA does not define what type of land use applications would "threaten the potential" for mineral extraction, it is not possible to identify all the projects that might fall within the ambit of this requirement. Judging from SMARA's legislative history and its provisions as a whole, though, the Legislature likely intended that term to include at least those projects proposed on, adjacent to, or near the classified or designated areas that would, without mitigation, be incompatible with mining.

Of course, this raises the additional question as to which projects would be considered incompatible. Fortunately, SMARA's administrative regulations shed light on this question, noting that examples of "compatible" land uses include "very low density residential, geographically extensive but low impact industrial, recreational, agricultural, silvicultural, grazing, and open space."[17] They additionally clarify that examples of "incompatible" uses are those such as "high density residential, low density residential with high unit value, public facilities, geographically limited but impact intensive industrial, and commercial."[18] Absent a statutory definition of the term "threaten the potential to extract," the author believes that these latter uses, falling within the regulations' definition of "incompatible" uses, would be examples of the types of uses that would threaten the potential to extract from classified or designated uses.

When such incompatible uses are proposed on, adjacent to, or nearby a classified or designated resource, SMARA requires that, before permitting the uses, cities and counties prepare special findings consisting of statements "specifying [their] reasons for permitting the proposed use[s]."[19] SMARA also mandates that they prepare these statements in conjunction with the California Environment Quality Act ("CEQA").[20]

SMARA's invocation of CEQA in conjunction with the mandatory statement requirement is noteworthy. Because of CEQA's involvement, cities and counties must not only prepare the required statements, but before doing so, must consider the projects' impacts on the mineral resources as potentially significant and adverse environmental impacts that may require environmental impact reports ("EIR"). If EIRs are required, agencies must further identify appropriate mitigation for the projects' impacts on the resources or, if no mitigation is possible, adopt statements of overriding considerations for allowing the impacts.

Failing to comply with CEQA in these regards could open up the projects to subsequent CEQA lawsuits filed by property owners or mining companies interested in the resources.

As a part of this CEQA review, SMARA also mandates that cities and counties forward their statements to the SMGB and State Geologist.[21] While the Act does not make clear when cities and counties must do this, the author believes that those agencies should do so no sooner than the time required for circulating the projects' environmental documents. Providing the statement by that time would allow the SMGB and State Geologist to comment about the projects' impacts on the adjacent or nearby mineral resources, which would seem to be the very purpose for requiring them to be notified. To be on an even safer side, though, cities and counties should probably also forward the projects' initial studies to the SMGB and State Geologist so that they can comment on the projects at an even earlier stage.

PROJECTS "INVOLVING" DESIGNATED MINERAL RESOURCES

Different requirements apply whenever cities and counties consider land use applications "involving" designated mineral resources. (Mineral resources that have only been classified, but not designated, are not subject to these requirements.) While projects that would threaten mineral extraction include incompatible land uses proposed on, adjacent to, or nearby the mineral lands, projects "involving" the mineral resources include mining projects proposed to occur on the mineral lands themselves.

For these projects, SMARA imposes two requirements. First, SMARA provides that city or county decisions concerning the mining projects must be "in accordance with [their] mineral resource management policies."[22] As noted above, those policies, part of city and county general plans, must, among other things, "emphasize the conservation and development of [the designated] mineral deposits."[23] Because any subordinate land use decisions would have to comply with these policies under the general plan "consistency" doctrine, it follows that the decision concerning the mining applications would thus have to be consistent with the general plan goals of mineral conservation and development.

Second, SMARA requires that, "in balancing mineral values against alternative land uses," the city or county decision consider the importance of the minerals to be mined to their market region or to the State.[24] Here, as with the first requirement, SMARA encourages mineral development by requiring cities and counties to make decisions based on analyses of the regional or statewide demand for minerals, rather than analyses of purely local interests. How the city or county addresses this requirement, as well as how it addresses the requirement that its decision be consistent with its mineral resource management policies, should be reflected in written findings adopted along with other mandatory findings for the project.

In light of these requirements, one might argue that SMARA appears to require cities and counties to approve mining applications. Yet, that would not be correct. SMARA makes clear that it does not infringe on city and county zoning and police powers and, therefore, does not mandate the actual decision that cities and counties make.[25] As noted, however, cities and counties must adopt general plan policies to conserve significant mineral resources and their land use decisions must be consistent with those policies. With its additional requirement that cities and counties consider the regional or statewide interest in the mining applications, SMARA—though not requiring approvals of mining applications—certainly encourages cities and counties to approve them.

CONCLUSION

Significant mineral resources are likely to garner much more attention in the coming years as California addresses its long-term need for mineral resources. Although this article could not cover every issue that may come up as cities and counties increasingly deal with land use matters involving those resources, it has covered SMARA's basic requirements for protecting and conserving them. The article should thus give municipal attorneys a good background for advising public agencies when matters involving the resources arise.

ENDNOTES

1. Susan L. Kohler, *Aggregate Availability in California, Map Sheet 52*, 8 (Cal. Geol. Surv. 2002).
2. Ralph C. Loyd, *Mineral Land Classification in California*, California Geology, Mar. 1982, at 49-50.
3. Report of the Committee on Surface Mining, Oct. 27, 1970, at App. C.
4. *Id.* at 20.
5. *Id.* at 22-23.
6. Cal. Pub. Res. Code § 2761(a), (b)(2).
7. Cal. Dept. of Conserv., *Guidelines for Classification and Designation of Mineral Lands 2*.
8. Cal. Pub. Res. Code §§ 2726-2727.
9. *Id.* at § 2790.
10. *Id.* at § 2791.
11. *Id.* at § 2790.
12. *Id.* § 2762(a).
13. *Id.* § 2762(b).
14. *Id.* § 2762(a)(1)–(3); Cal. Code Regs. tit. 14, § 3676(a), (b), (c)(1)-(2).
15. Cal. Code Regs. tit. 14, § 3676(c)(3)(A)-(C).
16. Cal. Pub. Res. Code §§ 2762(d), 2763(a)-(b).
17. Cal. Code. Regs. tit. 14, § 3675.
18. *Id.*
19. Cal. Pub. Res. Code § 2762(d).
20. *Id.*
21. *Id.*
22. *Id.* § 2763(a), (b).
23. *Id.* § 2762(a)(3).
24. *Id.* § 2763(a), (b).
25. *Id.* § 2715(f).

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Is the Federal Clean Air Act Being Polluted By the EPA's New Ozone Regulations?

*By Frances L. Keeler**

Southern California is known for its miles of beaches, sunny skies, movie stars, and —much to the dismay of many—smog. While the South Coast Air Quality Management District (District), the regional agency responsible for cleaning the air, and the California Air Resources Board (ARB), the state air agency, have worked for decades to eliminate the hazy skies, on sunny summer days the smog still blankets the region.

Smog is comprised of various air pollutants that impair visibility. Principal among these pollutants is ozone, which is a direct product of those sunny skies. The technical measures for air pollution are state and federal ambient air quality standards. These are health protective levels established by the federal Clean Air Act (CAA), the United States Environmental Protection Agency (EPA) and the ARB for each air pollutant. The South Coast Air Basin, the area under the jurisdiction of the South Coast Air Quality Management District, has never met the standards for ozone.

In 1997, the EPA established new federal standards for ozone and particulate matter pursuant to Section 109 of the Clean Air Act (42 U.S.C. §7409). These standards, an 8-hour ozone standard and a 24-hour and an annual average standard for fine particulates (PM2.5) were challenged and, on appeal, the United States Supreme Court upheld EPA's authority to adopt new national ambient air quality standards.[1] Subsequently, in 2004, EPA adopted a rule to implement the new 8-hour ozone standard. In its implementation rule, EPA revoked the existing 1-hour ozone standard, and through interpretation, rendered several sections of the Clean Air Act inoperable. EPA was then sued by several state and local air pollution control agencies, and environmental and citizen groups.

The legal issue is whether EPA has the authority to override specific Congressional mandates codified in the CAA. More important is the practical implication: does the revocation of the 1-hour standard and other requirements prolong the exposure of millions of people in Southern California and other areas throughout the country to unhealthy levels of ozone? The case is currently before the Court of Appeals for the D.C. Circuit, consolidated as *South Coast Air Quality Management District, et al v. U.S. Environmental Protection Agency*,[2] Case No. 04-1200.

The Clean Air Act of 1970 was enacted by Congress as "a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution."[3] Congress required EPA to study the health impacts of air pollutants on US citizens and to promulgate and periodically update national ambient air quality standards (NAAQS) to protect the population from harmful air pollutants.[4] States with areas that exceed these NAAQS are then required to develop "state implementation plans" ("SIPS"), containing specific measures that the state will undertake to reduce air pollution to bring polluted areas into compliance with the standards.[5]

EPA adopted NAAQS for carbon monoxide, nitrogen dioxide, sulfur dioxide, ozone, particulate matter, and lead. However, after years of states failing to attain the standards, Congress amended the CAA codifying the NAAQS, classifying nonattainment areas by severity, and specifying requirements for each class of nonattainment area. The further an area is from nonattainment, the more requirements the area must meet. Congress also designed a schedule for the areas to come into attainment from 1990, the last year Congress amended the CAA, with the most polluted area, Los Angeles, having until 2010 to attain the legislatively mandated 1-hour ozone standard.

Ozone, the pollutant at issue in the *South Coast* case, is a primary component of what has been termed smog. Ozone is a highly reactive compound and severe lung irritant, even to healthy adults. When it comes into contact with the tissues in the respiratory tract, it reacts - causing damage in the airways. Adverse health effects include increased respiratory symptoms, such as asthma, damage to cells of the respiratory tract, decreases in lung function, increased susceptibility to respiratory infection, and increased risk of hospitalization. The adverse effects of ozone are greater with increased activity, thus the part of the population most sensitive to the effects are children, exercising individuals, and persons with preexisting lung disease.[6] Ozone is formed when two types of air contaminants, volatile organic compounds ("VOCs") and oxides of nitrogen ("NOx") are emitted into the atmosphere and react in the presence of sunlight.

In Subpart 2 of the CAA, however, Congress became explicit in the requirements that a SIP must meet and when states must demonstrate attainment. For instance, Congress classified ozone nonattainment areas as "marginal," "moderate," "serious," "severe" or "extreme" based on the severity of the area's ozone levels, or design values. These classifications are listed in Table 1 of CAA §181(a)(l)[7] ("Table 1"). Congress also included in Table 1 the outside date by which the standard must be achieved for each classification.

Subpart 2 also requires nonattainment SIPs to include very specific control measures depending on the area's classification. As the area's classification worsens, the area must meet more stringent requirements, and additional measures are included. For example, a Moderate area plan must include: reasonable further progress provisions demonstrating a 15% reduction in emissions of VOC and NOx by the attainment date, must contain reasonably available control

technologies, a gasoline vapor recovery rule, a motor vehicle inspection and maintenance program, and an emissions offset ratio of 1.15 to 1 for new sources.[8] Serious nonattainment areas must add to the requirements of the Moderate areas, a reasonable further progress provision of 3% per year reduction in NOx and VOC, an enhanced vehicle inspection and maintenance program, a clean fuel vehicle program, transportation control plan, additional contingency measures beyond the general provision that the area must undertake if it fails to meet a milestone, and an offset ratio for new sources of 1.2 to 1.[9]

Severe and Extreme areas are subject to even more controls and offsets of up to 1.5 to 1. Additionally, the size of sources needing to provide offsets and controls decreases with each more severe classification to include smaller sources. Thus, for a marginal area, a source is Major if it emits more than 100 tons per year of an air contaminant, but for extreme areas the threshold reduces to 10 tons per year.[10]

With the 1990 CAA Amendments, Congress established the NAAQS for ozone NAAQS at 0.12 parts per million (ppm) averaged over a 1-hour period. After extensive health-based studies conducted by EPA, the agency determined in 1997 that the 1-hour ozone NAAQS did not adequately protect the population from long term exposures to ozone.[11] EPA promulgated new ozone NAAQS of 0.08 ppm averaged over an 8-hour period (8-hour ozone standard). Id. In rules implementing the standard, EPA required that the 1-hour standard remain in effect for a nonattainment area until that area has met the standard. Thus, EPA intended that the 8-hour standard be in addition to the 1-hour standard. EPA's implementation rule also attempted to have the 8-hour SIPs only subject to the general requirement of Subpart 1, abandoning the Subpart 2 requirements.

In *Whitman v. American Trucking Assn.*,[12] the Supreme Court upheld EPA's authority to adopt the new standards, but unanimously rejected EPA's policy for implementing the 8-hour standard solely under Subpart 1. The Court found that Congress intended Subpart 2 to govern implementation of ozone standards "far into the future" and that EPA could not render Subpart 2 "abruptly obsolete" or "construe the statute in a way that completely nullifies" the explicit Subpart 2 mandates.[13]

On April 30, 2004, EPA promulgated an ozone implementation rule,[14] and designated in another rule the areas throughout the country that were attainment and nonattainment.[15] Among other things, these rules provided for the revocation of the 1-hour standard on June 15, 2005, one year after the effective date of the 8-hour designations.[16] The rules provided for regulation under Subpart 2 of those areas that violated the 1-hour standard at the time of 8-hour designation.[17] EPA's designation scheme entailed modifying Congress' Table 1 by proportionately adjusting the ozone design values for the various classifications to reflect the severity of an area's 8-hour exceedances.[18] Outside attainment deadlines for these areas were set at the same number of years Congress had initially allowed for attainment in Table 1.[19]

EPA's rules require that 8-hour nonattainment areas that were also 1-hour nonattainment areas comply with some of the CAA Subpart 2 requirements. Termed "antibacksliding" measures, these rules require 1-hour nonattainment areas to continue to implement measures such as auto emissions testing and enhanced emissions monitoring on the schedules required under their 1-hour classifications.[20] However, EPA failed to require the areas to comply with several other CAA requirements, including new source review requirements, controls required to assure timely progress toward and timely attainment of the 1-hour standard, emission fees levied against industries that fail to cut emissions by 20% in severe and extreme 1-hour nonattainment areas that do not timely attain, contingency measures imposed automatically when areas fail to achieve timely progress or attainment, and transportation conformity demonstrations.[21]

It is undisputed that several areas, including Los Angeles, San Joaquin and Houston, had not attained the 1-hour standard at the time EPA revoked the standard. Los Angeles was not even required to attain until 2010, five years after EPA revoked the standard.

EPA, supported by several industry intervenors and states, maintains that since it has adopted a more stringent ozone standard pursuant to its authority under the CAA, and since the 1-hour standard is, in EPA's opinion, necessary to protect public health, it may revoke the 1-hour standard. EPA maintains that the issuance of the 8-hour standard is a revision of the 1-hour standard and not an additional standard.[22] Many believe that requiring an area to devote resources to attaining the 1-hour standard will detract from an area's ability and resources in attaining the more protective 8-hour standard, and the measures needed to implement the 8-hour standard will further reduce the 1-hour peak concentrations of ozone. EPA maintains that its approach, including the imposition of anti-backsliding measures will not result in a degradation of air quality. Further, EPA determined that the exclusion of some of the CAA requirements was necessary as those measures would "unnecessarily curb economic growth and impose undue burdens on regulators without providing tangible emission reduction benefits."[23]

Petitioners in the *South Coast* case believe, however, that until an area has attained the 1-hour standard, EPA has no authority to revoke the congressionally imposed standard. Nearly all agree that in most circumstances the 8-hour standard is more health protective than the 1-hour standard, however, there are some instances where ozone concentrations will peak to high levels for shorter durations. These peak ozone concentrations exceed the 1-hour standard, but are not addressed by the 8-hour standard, thus the health protections Congress imposed no longer exist. EPA does not dispute that the peak ozone concentrations occur; rather EPA dismisses the impacts as minimal.

CAA §172(e) supports the argument that all of Subpart 2 requirements should apply. The effect of these exclusions is to allow a significant weakening of statutorily mandated ozone control requirements in pre-existing nonattainment areas that have never attained any federal ozone protection standard—whether 1-hour or 8-hour. EPA's relaxation of NSR requirements allows many large factories and power plants to substantially increase their emissions without installing state-of-the-art pollution controls or obtaining emissions offsets that would have been required under the 1-hour standard. Likewise, EPA's rules let states drop pollution control measures already adopted to achieve emission reductions mandated by Subpart 2 for 1-hour nonattainment areas, without making up the lost reductions. There is no rationale to

explain the random choices by EPA of which requirements should remain, and which should not.[24]

While the experts do agree that many of the control measures needed to bring areas into attainment of the 8-hour standard will also bring the area into attainment of the 1-hour standard, the deadline has been greatly extended. Therefore, it is more than likely that the millions of Americans who live in these nonattainment areas will be exposed to peak ozone concentration much longer than Congress had intended.

The *South Coast* case is not yet scheduled for oral argument.

ENDNOTES

1. *Whitman v. American Trucking Assn.*, 531 U.S. 457 (2001)
2. Petitioners are South Coast Air Quality Management District (No. 04-1200); State of Ohio (No. 04-1201); Louisiana Environmental Action Network (No. 04-1206); The Chamber of Greater Baton Rouge, The West Baton Rouge Chamber of Commerce, The Iberville Parish Chamber of Commerce, The Louisiana Oil Marketers and Convenience Store Assn, Couhig Southern Environmental Services of Baton Rouge, Inc, Lovie Robinson Hamnlett (No. 04-1208); American Lung Assn, Environmental Defense, Natural Resources Defense Council, Sierra Club (Nos. 04-1 210,04-1376,04-1379,05-1281, and 05-1282); Conservation Law Foundation, Southern Alliance for Clean Energy (No. 04-1212); TXI Operations, LP 04-1214, 04-1215, 04-1265 and 04-1266); National Petrochemical and Refiners Assn (No. 04-1216); Commonwealth of Massachusetts, State of Connecticut, State of New York, District of Columbia (Nos. 04-1377 and 05-1359); Commonwealth of Pennsylvania, State of Delaware, State of Maine (No. 04-1377); and the Commonwealth of Pennsylvania, Department of Environmental Protection (No. 05-1359).
   Respondents are United States Environmental Protection Agency and Michael 0.Leavitt, Administrator, United States Environmental Protection Agency. Intervenors for respondents are State of Georgia, National Environmental Development Assn, National Petrochemical & Refiners Assn, American Chemistry Council, American Forest and Paper Assn., Inc, American Petroleum Institute, National Assn of Manufacturers, Utility Air Regulatory Group, Renewable Fuels Assn, American Lung Assn, Environmental Defense, Natural Resources Defense Council and Sierra Club.
3. *Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976)
4. CAA § 109, 42 U.S.C. § 7409
5. CAA § 110, 42 U.S.C. § 7410
6. South Coast Air Quality Management District. "2003 Air Quality Management Plan" Appendix I, I-1 through I-5.
7. 42 U.S.C. § 751 l(a)(l)
8. New sources must provide emissions offsets in the amount of 1.15 pounds for each pound of emissions they will have. Section 182(b).
9. CAA § 182(c)
10. CAA §§ 172(c)(5), 173, 42 U.S.C. §§ 7502(c)(5), 7503
11. 62 Fed. Reg. 38856
12. 531 U.S. 457,481-86
13. Id. 485
14. 69 Fed. Reg. 23951
15. 69 Fed. Reg. 23858
16. *Id.* 23996
17. *Id.*
18. *Id.* 23997-98
19. *Id.*
20. 69 Fed.Reg. 23997-24000
21. *Id.* 23971-87; 70 Fed. Reg. 30592.
22. See, Initial Brief for Respondent, Environmental Protection Agency at 13, *SCAQMD v. EPA*, Feb. 9, 2006
23. *Id.* 35-37
24. Reply Brief for Petitioners, and Environmental Petitioners and South Coast Air Quality Management District, *SCAQMD v. EPA*, May 4, 2006.

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AB 1234: The Rise of the Unfunded Mandate

By Sigrid Asmundson*

INTRODUCTION

Assembly Bill 1234 ("AB 1234") provides that *if* a local agency gives any type of compensation, salary, stipend, or reimbursement to *any* member of a legislative body of the local agency, then *all* local agency officials must attend ethics training. While many local agencies do not provide any compensation, salary, or stipend to its elected or appointed officials, almost all local agencies in California provide some form of reimbursement for actual and necessary expenses, such as travel, meals, and lodging, incurred in relation to their official duties. To provide ethics training for all local agency officials imposes new financial costs on a local agency. However, to terminate a local agency's reimbursement policy for necessary expenses would shift the financial burden from the local agency to the local agency official, a nonviable option.

Article XIII B, section 6 of the California Constitution ("Section 6") was created to compensate local agencies for expenses incurred when new legislation imposes mandatory financial costs on local agencies. However, under the California Supreme Court's 2003 decision in *Department of Finance v. Commission on State Mandates ("Department of Finance"), and its subsequent decision in San Diego Unified School District v. Commission on State Mandates ("San Diego Unified")*, AB 1234 does not qualify as a reimbursable state mandate. This Article describes how recent common law creates a loophole for the legislature to impose unfunded state mandates on local agencies and how AB 1234 is an example of the legislature's use of this loophole. But for this loophole, AB 1234 would constitute a state mandate under Section 6.

I. THE CREATION OF REIMBURSABLE STATE MANDATES

A. Constitutional Limits on California Property Tax

In the late 1970s, California voters passed Propositions 13 and 4, which limit property tax, a significant source of revenue for local budgets.[1] Proposition 13, which added Article XIII A to the California Constitution, prevents annual increases in property value for purposes of property tax assessment and only allows for the reassessment of a property's value to current market value after the sale, transfer or construction of the property.[2] Article XIII A states that a property's value may not increase by more than one percent each year for tax purposes, regardless of the actual current market value of the property.[3] Less than eighteen months later, California voters imposed government spending limits on existing property tax revenue by adopting Proposition 4, which added Article XIII B to the California Constitution.[4] Article XIII B places limits on a local agency's authority to spend property tax revenue by establishing an appropriations limit for each local government, beginning in fiscal year 1980-1981.

B. The Commission on State Mandates

The reduction of property tax revenue created by Articles XIII A and XIII B necessitated the adoption of California Constitution Article XIII B, section 6, which requires state reimbursement for local funds expended on state mandated costs.[5] Section 6 provides that "whenever the legislature, [Governor] or any state agency mandates a new program or higher level of service on any local government...the State shall provide a subvention of funds to reimburse such local government for the costs of such program or higher increased level of service."[6] Therefore, when a state agency *requires* local agencies to participate in a specific program in which participation was not previously required, the state must reimburse the local agency for costs incurred.[7]

In 1985, the legislature created the Commission on State Mandates ("Commission") to review local agencies' claims for Section 6 state reimbursement.[8] The Commission acts as a quasi-judicial body that adjudicates disputes regarding whether a state action qualifies as a state-mandated program within the meaning of Section 6.[9] The Commission possesses the sole and exclusive authority to decide whether a state mandate exists.[10]

Under Section 6, local agencies must file claims with the Commission in order to receive reimbursement for state-mandated costs.[11] A claim alleges that a statute or an executive order imposes a reimbursable state-mandated program and is called a "test claim."[12] All interested parties may present evidence in support of or opposition to a test claim at the Commission's bi-monthly meeting.[13] After all interested parties have presented, the Commission determines whether a reimbursable state-mandated program exists.[14] If the Commission determines that a reimbursable program exists, it approves the test claim and recommends that the claimant receive state reimbursement.[15] If the Commission determines that the test claim does not present a reimbursable state mandate, state or local agencies may seek judicial review of the Commission's decision through a petition for writ of mandate.[16]

C. Article XIII B, section 6 Requirements

1. The Four Part Test of Section 6

The Commission determines whether the test claim legislation imposes an obligation on local agencies to implement new programs or provide higher levels of service to existing programs.[17] Test claim legislation refers to the specific statute that, according to the submitted test claim, requires state reimbursement.[18] To qualify for

reimbursement, test claim legislation must meet four requirements.[19]

First, the state must have enacted the test claim legislation on or after January 1, 1975.[20] Second, local agencies must expend a minimum of $1,000 of local tax revenue on state mandated programs.[21] These first two elements are rarely contested.

Third, test claim legislation must require mandatory compliance by local agencies to perform a new program or higher level of service for an existing program.[22] Mandatory compliance means that local agencies must comply with new legislation or face penalties for noncompliance.[23] Discretionary compliance means that local agencies may either comply with new legislation mandating a specific action or decline to participate in the program.[24] Unless local agencies face penalties for non-compliance with new legislation, participation in new programs is discretionary and non-reimbursable.[25]

Fourth, test claim legislation must qualify as a "program."[26] To qualify as a program, the new activity required by the test claim legislation must either: (1) perform a governmental function by providing a service to the public; or (2) impose unique requirements on a local government which do not generally apply to all residents and entities in the state.[27]

2. A New Program or Higher Level of Service

If a new activity qualifies as a program, the Commission must then determine if the activity constitutes a "new program" or a "higher level of service."[28] Merely qualifying as a program is not enough to receive reimbursement.[29] A program mandated by the state must satisfy two tests in order to determine if the state has imposed a new program or a higher level of service.[30]

The first test ascertains whether the state imposed any activities on the local agency not already required by prior law.[31] To determine this, the Commission compares the test claim legislation against the affected program's legal requirements prior to the enactment of the test claim legislation.[32] A mere increase in the cost of a program does not constitute a new required activity.[33]

The second test determines whether test claim legislation shifts state costs to local agencies.[34] The state must either have complete or partial administrative control over the program before the test claim legislation and must have borne the entire or partial cost of operating the program.[35] If test claim legislation fulfills either test, a new program exists.[36]

II. THE EVOLUTION OF THE DISCRETIONARY MANDATE

A. Department of Finance v. Commission on State Mandates[37]

In 1998, San Diego Unified School District, Kern High School District, and the County of Santa Clara ("Claimants") filed a test claim with the Commission for reimbursement of new costs imposed through Government Code section 54952 ("Section 54952") and Education Code section 35147 ("Section 35147"). Section 54952 defines a legislative body, as used by the Brown Act, to include any "body of a local agency,...decisionmaking or advisory, created by charter, ordinance, resolution, or formal action of a legislative body."[38] Section 35147 requires that eight specific school site councils and advisory committees must comply with the open meeting requirements of the Brown Act.

Claimants filed a test claim with the Commission seeking reimbursement for costs incurred by its school site councils and advisory committees in compliance with the open meeting requirements of the Brown Act, specifically, the cost of preparing and posting agendas.[39] The Commission concurred that these constituted a Section 6 reimbursable mandate. The Department of Finance ("Department") filed a writ of mandate against the Commission. It argued that participation in school site councils and advisory committees was discretionary, and the drafters of Section 6 intended to limit state reimbursement to costs stemming from a local government's mandatory participation in a new program or higher level of service.

The California Supreme Court reversed the Commission's decision. The court held that local agencies had no legal obligation to participate in school site councils and advisory committees and that Claimants failed to show a legal compulsion to participate in these voluntary programs. Claimants argued that Section 54952 and Section 35147 legally compelled local agencies to incur new costs in providing a higher level of service to existing school site councils and advisory committees. The court decided, however, that a local agency was not legally compelled to provide site councils or advisory committees and thus was not compelled to participate or incur legal penalties for noncompliance.

The court also noted that the costs associated with the open meeting requirements of the Brown Act were modest, constituting only a "reasonable district administrative expense."[40] It concluded that local governments could easily finance the new costs with existing local funds. A year after its decision in *Department of Finance*, the California Supreme Court cautiously reaffirmed its interpretation of Article XIII B, section 6.

B. San Diego Unified School District v. Commission on State Mandates[41]

In 1994, San Diego Unified School District ("SDUSD") filed a test claim with the Commission for reimbursement of new costs imposed through Education Code sections 48915 and 48918 ("Section 48915" and "Section 48918," respectively). Section 48915 defines circumstances in which a principal *must* suspend a student and recommend that student's expulsion, and circumstances in which a principal *may* recommend a student's expulsion. If a student is suspended in accordance with Section 48915, Section 48918 mandates that a student has the right, before expulsion, to a hearing. Section 48918 sets forth the procedures that a school board must follow when conducting a hearing. SDUSD asserted that adhering to such procedural requirements mandates the expenditure of public funds and qualifies for state reimbursement.

The Commission determined that a new program or higher level of service only exists when a principal is required to suspend a student and recommend expulsion. However, the Commission concluded that the a vast majority of hearing requirements triggered by

Section 48915 were not reimbursable because they were mandated by federal, and not state, law. The Commission further concluded that in regards to all discretionary expulsions set forth in Section 48915, the school district could not receive reimbursement for hearing costs, as they were not mandated by the state but instead represented a discretionary decision by the principal.

The California Supreme Court determined that Section 48915, to the extent that it compels suspension and mandates a recommendation of expulsion, qualifies as a "higher level of service" in accordance with Article XIII B, section 6. The court additionally held that Section 48915 imposed a reimbursable state mandate for all resulting hearing costs, even those costs attributable to federal law.

However, the court concluded that hearing costs incurred in relation to any discretionary expulsions were not reimbursable. The court decided that to the extent that Section 48915 creates discretionary suspensions, it does not reflect a new program or higher level of service to an existing program. It determined that such procedures were minimal, and even if the costs were deemed to be state mandated, such requirements pre-dated 1975 and could not qualify for state reimbursement.

C. Assembly Bill 1234

AB 1234 provides that *if* a local agency gives any type of compensation, salary, stipend, or reimbursement to *any* member of a legislative body of the local agency, then *all* local agency officials must attend two hours of ethics training every two years.[42] Compensation includes reimbursement for actual and necessary expenses incurred in the performance of official duties, such as travel, meals, lodging, and any other expenses approved by the governing body. Local agency officials include: (1) all elected officials and members of a legislative body who receive any type of compensation, salary, stipend, or reimbursement; and (2) any employee designated by the governing body to receive ethics training.[43] A legislative body is defined as the governing body of a local agency, or any commission, committee, board, or other body of a local agency, whether permanent or temporary, decisionmaking or advisory, created by either ordinance, resolution, or formal action of the governing body.[44]

III. ANALYSIS

Based on the holding of *Department of Finance* and *San Diego Unified School District*, AB 1234 does not qualify as a reimbursable state mandate. But for this recent common law creation of the unfunded mandate, however, AB 1234 would qualify as a reimbursable state mandate.[45] There is no doubt that almost all local agencies have no choice but to comply with AB 1234. AB 1234 meets the four requirements of Article XIII B, section 6 and compelled local agencies to incur new costs. Local agencies cannot feasibly terminate reimbursement policies for their local agencies officials; to do so would impose a significant financial burden on such officials. *Department of Finance* and *San Diego Unified School District* are adverse to public policy, as they create a precedent which will restrict local agencies from receiving state reimbursement for programs that provide an essential service to the community.

A. Under Statutory Law, AB 1234 Should Qualify as a Reimbursable State Mandate

Local agencies cannot feasibly retract reimbursement or compensation policies, which have existed in most local agencies for decades and which are necessary for local agency officials to perform their duties. Without reimbursement policies, local agency officials would be forced to personally incur significant financial burdens. Qualified candidates would forgo applying for local agency official positions unless they are financially secure enough to bear the related costs. But for the holdings of Department of Finance and San Diego Unified School District, AB 1234 would meet the statutory requirements to qualify as a reimbursable mandate.

1. AB 1234 Meets the Four Part Test of Article XIII B, section 6

AB 1234 meets the four requirements of Section 6. First, the California legislature enacted AB 1234 after January 1, 1975. Second, AB 1234 forces local agencies to expend local tax revenue. AB 1234 requires local agencies to provide two hours of ethics training every two years for all of its local agency officials. In requiring local agencies to comply with AB 1234, costs associated with compliance must come from that specific agency's tax revenue.

Third, AB 1234 requires mandatory compliance by all local agency officials. As such, local agencies must comply with these requirements or face penalties for noncompliance. The California Supreme Court has conceded that situations may exist in which local agencies adopt optional programs that become too well-established to terminate. In such situations, a court cannot expect local agencies to discontinue participation in such programs rather than choosing to accept the additional costs. Local agencies can not realistically invalidate reimbursement policies, and thus must accept all costs associated with AB 1234.

Fourth, AB 1234 qualifies as a Section 6 "program."[46] Prior case law defines a program as an activity that imposes unique requirements on local governments which do not apply to all residents and entities of the state.[47] No private entity must attend ethics training in accordance with AB 1234. AB 1234 applies solely to local agencies and concerns reimbursement and compensation of local agency officials, a particular governmental function.

2. AB 1234 Requires a Higher Level of Service to Existing Programs

AB 1234 imposes a higher level of service on local agencies. Prior to the passage of AB 1234, local agency officials were not required to attend ethics training. After its passage, however, all local agencies that provide any type of salary, stipend, reimbursement, or compensation to its local agency officials must require all officials to attend at least two hours of ethics training every two years. Local agencies incur new, specific costs related to providing ethics trainings, requiring all local agency officials and designated employees to attend such trainings. The resulting costs of AB 1234 have created a higher level of service to an existing local program.

B. Local Agencies Are Compelled to Accept State Imposed Costs

Section 6 provides reimbursement for any new legislation mandating a new program or higher level of service on any local agency.[48] Mandatory compulsion occurs when a local agency has no choice but to comply with new legislation.[49] Local agencies cannot feasibly cancel reimbursement policies without forcing local agency officials to personally incur significant financial costs, a nonviable option. Therefore, local agencies are compelled to bear all costs or risk penalties for noncompliance.[50]

1. Local Agencies Must Comply With New State-Imposed Requirements

AB 1234 *compels* a higher level of service to an existing program. In *Department of Finance* and *San Diego Unified*, however, the California Supreme Court determined that unless a local agency is "legally compelled" to provide a new program or higher level of service, it may not receive state reimbursement. Nevertheless, given that local agencies are forced to provide reimbursement or compensation to cover expenses incurred by local agency officials in furtherance of their duties, practical reasons prevents them from discontinuing participation. As local agency officials already receive very little compensation for the level of work required by their position, local agencies are compelled to pay new costs imposed by AB 1234 regardless of whether they qualify for state reimbursement.

Strict legal compulsion is defined as a mandatory action required by law.[51] While ruling that compulsion did not exist in *Department of Finance*, the California Supreme Court did not determine whether a discretionary program becomes a mandatory state program when a local agency commits to continued participation.[52] *San Diego Unified*, however, did briefly provide that a discretionary decision to suspend a student could qualify for reimbursement, as certain circumstances will inevitably warrant a suspension. The *San Diego Unified* court reasoned that under those circumstances, the provision of a hearing and the additional cost associated with that hearing may necessitate state reimbursement. However, the court failed to resolutely hold that discretionary decisions may justify state reimbursement by rejecting reimbursement for the specific statute under different grounds, leaving the holding of *Department of Finance* intact.

2. *Local Agencies Cannot Void Reimbursement Policies for Their Local Agency Officials Without Incurring Penalties*

The California Supreme Court determined that when local agencies face additional costs resulting from new legislation, they may voluntarily cancel optional programs without risking legal fines or penalties for terminating participation. The court, however, stated that when local agencies choose to adopt or continue optional programs, they must follow all laws pertaining to such programs.[53] Based on this holding, the court requires local agencies to either accept costs associated with "optional" legislation such as AB 1234 or terminate policies providing any form of salary, stipend, compensation, or reimbursement to local agency officials. According to the court, if a local agency has some form of discretion to discontinue optional programs, it did not qualify for Section 6 reimbursement.

The California Supreme Court, however, failed to recognize that certain legislation, such as AB 1234, leaves a local agency with no true option or choice but to continue providing reimbursement or compensation to local agency officials. The "absence of a reasonable alternative to participation is a de facto mandate."[54] For AB 1234, local agencies have no choice but to continue reimbursement policies and incur related costs. Local agencies cannot feasibly cancel an optional program so well-established and beneficial. When local agencies cannot feasibly cancel well-established, optional programs, they are practically compelled to accept all new costs. Thus, local agencies have no choice but to accept all of AB 1234's requirements.

C. AB 1234: The Negative Repercussions of *Department of Finance* & *San Diego Unified School District*

1. Local Agencies May Choose Not to Participate in Future Optional Programs

AB 1234 is one of the first, and certainly not the last, instances in which local agencies feel the negative financial effects of *Department of Finance* and *San Diego Unified*. As the legislature continues to impose costs on existing optional programs, local agencies must find additional funding from sources other than the state.

The repercussions of Department of Finance and San Diego Unified are clear with the passage of AB 1234. The fear of future state action that imposes additional financial burdens on local budgets may deter local agencies from implementing new, beneficial programs. With no alternative source of revenue readily available to pay for new programs, local governments face high costs that their budgets cannot incorporate. Rather than participating in optional programs that they must rescind if new legislation imposes additional costs, local governments may chose not to implement optional programs altogether.

2. The California Supreme Court Will Not Overturn *Department of Finance* and *San Diego Unified* Until the Legislature Imposes High Administrative Costs on Discretionary Programs

The California Supreme Court has reasoned that even if local agencies are compelled to incur new costs, they can easily accept the modest costs imposed by legislation such as AB 1234.[55] It provided that local agencies should be able to bear reasonable administrative costs through existing funds when new legislation only mildly burdens the local agency's budget. Although AB 1234 creates an additional financial burden, it probably does not qualify as a significant enough expense to compel the California Supreme Court to overturn its ruling.

The court failed to realize, however, that allowing the state to continually impose "modest" costs on local agencies may eventually create a heavy financial burden. If courts continue to allow local budgets to accept new but modest costs, local agencies may eventually chose to forfeit optional programs to avoid incurring additional "modest" costs. The court conceded that

situations may exist in which new costs become so great as to significantly burden local funds.[56] However, the court did not explicitly declare that such situations of practical compulsion do, in fact, exist.[57]

CONCLUSION

The California Supreme Court definition of a state mandate as a "legally compelled" cost allows the legislature to impose new costs on local agencies without state reimbursement. If a local agency chooses to implement a discretionary program, it must comply with any legislative requirements for such programs. In determining that certain well-established programs were voluntary programs and thus not reimbursable, the California Supreme Court imposed a significant financial burden on local agencies.[58] Local agencies must now carefully consider potential future legislation when deciding to implement new programs.[59]

ENDNOTES

1. CAL. CONST. art. XIII B, § 6; CAL. GOV'T CODE §§ 17500 et. seq.; California Proposition 4, Limitation of Government Appropriations (1979) (codified as CAL. CONST. art. XIII B).
2. California Proposition 13, Property Tax Limitation (1978) (codified as CAL. CONST. Art. XIII A).
3. *Id.*
4. CAL. CONST. art. XIII B (providing reimbursement to local governments for new programs or higher level of services mandated by state).
5. The intent of the section 6 drafters was to prevent the state from imposing new costs onto local agencies. *See County of Fresno v. State* (1991) 808 P.2d 235, 238.
6. CAL. CONST. art. XIII B, § 6.
7. *Kinlaw v. State* (1991) 814 P.2d 1308, 1310; *Lucia Mar Unified Sch. Dist. v. Honig* (1988) 750 P.2d 318, 322; *County of Sonoma*, 101 Cal. Rptr. 2d at 788.
8. CAL. GOV'T. CODE §§ 17500 et. seq. The Commission reviews claims submitted by local agencies and school districts.
9. CAL. GOV'T. CODE § 17551; CAL. GOV'T. CODE § 17552.
10. CAL. GOV'T CODE §§ 17500 et. seq. *See City of Richmond v. Comm'n on State Mandates* (1998) 75 Cal. Rptr. 2d 754, 761 (holding that findings of legislature are irrelevant and cannot overrule final decision of Commission). The determination as to whether a statute or executive order constitutes a reimbursable state-mandated program is a question of law. (*County of San Diego v. State* (1997) 931 P.2d 312, 338.
11. CAL. GOV'T. CODE § 17551; CAL. GOV'T. CODE § 17560.
12. CAL. GOV'T. CODE § 17521.
13. CAL. GOV'T. CODE § 17555 (stating interested parties include, but not limited to, claimant, Department of Finance, state departments or agencies affected by claim, private organizations or individuals).
14. CAL. GOV'T. CODE § 17551.
15. CAL. GOV'T. CODE § 17514 (defining "Costs Mandated by the State"). *But see* CAL. GOV'T. CODE § 17556 (defining seven exceptions to prevent state reimbursement).
16. CAL. CIV. PROC. CODE § 1094.5; CAL. GOV'T. CODE § 17559 (petitioning final administrative decisions for judicial review).
17. CAL. CONST. art. XIII B, § 6; CAL. GOV'T. CODE § 17551; *see also* CAL. GOV'T. CODE § 17552.
18. CAL. GOV'T. CODE § 17521 (defining test claim as "the first claim, including claims joined or consolidated with the first claim, filed with the commission alleging that a particular statute or executive order imposes costs mandated by the state.").
19. CAL. CONST. art. XIII B, § 6.
20. *Id.*
21. *Redevelopment Agency of the City of San Marcos v. Comm'n on State Mandates* (1997) 64 Cal. Rptr. 2d 270, 275 (holding that drafters of section 6 did not intend to protect expenditures of tax increment financing fees). Section 6 provides reimbursement only when the state imposes new or increased costs that require local agencies to expend their local tax revenues. (*County of Fresno v. State* (1991) 808 P.2d 235, 238.) Statutes or executive orders that merely reduce existing property tax revenue without requiring additional expenditures of existing funds do not qualify as reimbursable state mandates. (*County of Sonoma*, 101 Cal. Rptr. 2d at 799.)
22. CAL. CONST. art. XIII B, § 6; *City of Sacramento v. State* (1990) 785 P.2d 522, 525.
23. CAL. CONST. art. XIII B, § 6. California courts have consistently held that legal compulsion occurs when the state imposes a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program. *See Dep't of Fin.*, 68 P.3d at 1205.
24. *Dep't of Fin.*, 68 P.3d at 1213 (holding that participation in optional programs is discretionary and non-reimbursable).
25. *Dep't of Fin.*, 68 P.3d. at 1220.
26. *County of Los Angeles v. State* (1987) 729 P.2d 202, 203.
27. *City of Richmond*, 75 Cal. Rptr. 2d at 759 (finding that legislation which eliminated exemption from providing workers' compensation death benefits to local safety members was not unique to local government since all employers, public and private alike, are required to provide workers' compensation benefits); *County of Los Angeles v. Dept. of Indus. Relations* (1989) 263 Cal. Rptr. 351, 355 (finding that regulations imposing certain safety precautions for all elevators, both public and private alike, were not unique to local government); *see also City of Sacramento*, 785 P.2d at 530 (stating that extending unemployment insurance coverage to local public employees does not constitute new program or higher level of service); *County of Los Angeles*, 729 P.2d at 203 (finding that workers compensation benefits apply to public and private employees and is not unique to local government).
28. *Redevelopment Agency*, 64 Cal. Rptr. 2d at 275 (finding central purpose of section 6 is to prevent state's transfer of cost of government from itself to local level).
29. *County of Los Angeles*, 2 Cal. Rptr. 3d at 429 (determining that peace officers qualify as "program" because they are unique to local government and carry out governmental function of public safety, but finding no state reimbursement when

local agencies comply with additional peace officer training).

30. *Lucia Mar Unified Sch. Dist. v. Honig* (1988) 750 P.2d 318, 322.

31. *Id.*; *see also County of Los Angeles v. State* (1987) 233 Cal. Rptr. 38, 43 (stating that prior law required all employers, public and private, to provide workers compensation benefits and thus such benefits did not constitute new program or higher level of service).

32. *Lucia Mar Unified Sch. Dist.*, 750 P.2d at 322.

33. *City of Anaheim v. State* (1987) 235 Cal. Rptr. 101, 103 (involving legislation that imposed temporary increase in PERS benefits to retired employees, which resulted in higher contributions by local agencies). Prior law may be general, but test claim legislation must mandate specific new requirements. (*Long Beach Unified Sch. Dist. v. State* (1990) 275 Cal. Rptr. 449, 460.)

34. *Lucia Mar Unified Sch. Dist.*, 750 P.2d at 322.

35. Proposition 1A (amending CAL. CONST. art. XIII B, § 6(c).)

36. *County of Los Angeles v. State* (1987) 729 P.2d 202, 203 (defining what constitutes program under Article XIII B, Section 6).

37. *Dep't of Fin. v. Comm'n on State Mandates* (2003) 68 P.3d 1203, 1208.

38. CAL. GOV'T. CODE § 54952(b). Prior law defined a "legislative body" to include any advisory commission, advisory committee or advisory body of a local agency *created* by charter, ordinance, resolution, or any similar formal action of a local agency. *See* CAL. GOV'T. CODE § 54952.3 (1981), *repealed by* S.B. 1140, 1993 Leg., ch. 1138 (Cal. 1994) (codified as CAL. GOV'T. CODE § 54952.2). Section 54952 expanded the definition of a "legislative body" to include "any other local body *created* by state or federal statute." (emphasis added). § 54952. The amended § 54952 became effective on April 1, 1994. Id.

39. *Dep't of Fin. v. Comm'n on State Mandates* (2003) 68 P.2d 1203, 1207.

40. CAL. EDUC. CODE § 52168(b) (allowing school districts to claim funds appropriated for purposes of section 6 for expenditures of reasonable district administrative expenses); *see also Dep't of Fin.*, 68 P.3d at 1216.

41. *San Diego Unified Sch. Dist. v. Comn. on State Mandates* (2004) 33 Cal. 4th 859, 872-73.

42. CAL. GOV'T Code § 53235. A local agency must maintain public records, for a minimum of five (5) years, showing that each local official has completed his or her ethics training requirements. (CAL. GOV'T Code § 53235.2.) These records must include the date of training and the entity that provided the training. The City must annually provide officials with information concerning available ethics training courses. (CAL. GOV'T Code 53235(f).) Ethics training courses may be self-study with tests taken at home, in person or online. Alternatively, the City may develop its own ethics training course or recommend an independent agency that provides training courses. However, the contents of any training course must first be approved by the Attorney General and the Fair Political Practices Commission.

43. CAL. GOV'T Code § 53234(c).

44. CAL. GOV'T Code § 54952.

45. CAL. CONST. art. XIII B, § 6 (providing that, "whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service.").

46. *County of Los Angeles v. State* (1987) 729 P.2d 202, 208 (defining "program" as peculiarly governmental function unique to local agencies).

47. *City of Richmond v. Comm'n on State Mandates* (1998) 75 Cal. Rptr. 2d 754, 757 (finding workers' compensation applies to public and private employers alike and thus is not unique to local government); *County of Los Angeles v. Dept. of Indus. Relations* (1989) 263 Cal. Rptr. 351, 356 (finding that regulations impose certain safety precautions for both public and private alike and thus are not unique to local government).

48. CAL.CONST. art. XIII B, § 6.

49. *Dep't of Fin. v. Comm'n on State Mandates* (2003) 68 P.3d 1203, 1213; *Carmel Valley Fire Prot. Dist. v. State* (2001) 20 P.3d 533, 545. *But see City of Richmond v. Comm'n on State Mandates* (1998) 75 Cal. Rptr. 2d 754, 759 (stating that statute affecting only local agencies is not automatic reimbursable state mandate).

50. *Dep't of Fin.*, 68 P.3d at 1213; *County of Fresno v. State* (1991) 808 P.2d 235, 239 (determining intent of section is defined by voters of measure, not drafters of provision); *see also Redevelopment Agency v. Comm'n on State Mandates* (1997) 64 Cal. Rptr. 2d 270, 277.

51. *County of Sonoma v. Comm'n on State Mandates* (2000) 101 Cal. Rptr. 2d 784, 797 (providing local agencies with assurance that state mandates would not place additional burdens on increasingly limited local revenue resources).

52. *Dep't of Fin.*, 68 P.3d at 1216.

53. *Id.*; *City of Merced v. State* (1984) 200 Cal. Rptr. 642, 646 (holding that when city chooses to exercise eminent domain, it may not receive state reimbursement).

54. *Dep't of Fin.*, 68 P.3d at 1217.

55. *Dep't of Fin.*, 68 P.3d at 1216.

56. *Dep't of Fin.*, 68 P.3d at 1216.

57. *Id.* at 1207.

58. *Dep't of Fin.*, 68 P.3d at 1213.

59. *County of Los Angeles v. Comm'n on State Mandates* (1995) 38 Cal. Rptr. 2d 304, 311.

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2006 Legislative Update

By Amy J. Lepine*

EMINENT DOMAIN/ REDEVELOPMENT

SB 1754 (Lowenthal)

This housing measure is designed to foster collaborative local and regional approaches to achieve affordable housing goals. The bill would create a voluntary pilot project with local-state partnership to provide high density housing through the creation of 100 housing infrastructure investment districts statewide.

The projects must be consistent with regional planning objectives and allow construction of more than 500 units of housing with average net density of 25-40 units per acre, with 15 percent of the housing affordable to low and moderate income families. The bill was recently amended to remove specific funding procedures.

Status: Active; passed as amended in Senate Local Government Committee April 5, 2006; referred back to the Committee on Transportation and Housing. Last hearing, April 25, 2006; held in committee under submission.

SB 1206 (Kehoe)

The Community Redevelopment Law authorizes the establishment of redevelopment agencies in communities in order to address the effects of blight in those communities, and defines a blighted area as one that is predominantly urbanized and characterized by specified conditions. This bill would revise the definition of "predominantly urbanized" and would revise the conditions that characterize a blighted area. This bill would also prohibit the inclusion of non-blighted parcels in a redevelopment project area for the purpose of obtaining property tax revenue from the area without substantial justification for their inclusion.

Status: Active; passed Senate Judiciary Committee as amended April 4, 2006; re-referred back to Committee on Appropriations June 29, 2006.

ACA 22 (La Malfa)

The California Constitution authorizes governmental entities to take or damage private property for public use only when Just Compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. It also authorizes the Legislature to provide for possession by the condemnor following commencement of the eminent domain proceedings upon deposit in court, and prompt release to the owner, of the money determined by the court to be the probable amount of the Just Compensation. This measure would provide that private property may be taken or damaged only for a stated public use and may not be taken or damaged without the consent of the owner for purposes of economic development, increasing tax revenue, or any other private use, nor for maintaining the present use by a different owner. The measure would also require that the property be owned and occupied by the condemnor, except as specified, and used only for the stated public use.

Status: Inactive; referred back to Committee on Housing and Community Development with amendments January 30, 2006.

AB 1162 (Mullin)

Existing law authorizes public entities to seize private property under the power of eminent domain. This bill would prohibit, until January 1, 2008, any community redevelopment agency, or community development commission or joint powers agency, as specified, from exercising the power of eminent domain to acquire owner-occupied residential real property if ownership of the property will be transferred to a private party or private entity. This bill contains other related provisions. Status: Active; referred to Committee on RLS September 6, 2005.

CONFLICT OF INTEREST

AB 1558 (Wolk)

This bill creates a pilot project to provide for advice and enforcement concerning financial interests in public contracts by the Fair Political Practices Commission. Currently, the Commission is responsible for regulation of campaign finance and for enforcement of disclosure and conflicts law by public officials as related to the Political Reform Act, Government Code §87100, et seq. The Act prohibits public officials from voting on or influencing governmental decisions in which they have a financial interest. The Commission issues opinions upon request relating to issues under the Act, and a person acting in good faith on one of these opinions is not subject to civil or criminal penalties for so acting, provided that the material facts are as stated in the opinion request.

This bill would give the Commission similar authority in relation to Government Code § 1090, et seq., which forbids public officials from being financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. It would provide procedures for the issuance of opinions, and would make reliance on advice in one of these opinions evidence of good faith in any civil proceeding, as specified. It would specify that the Commission shall have no enforcement authority under its provisions and that no local jurisdiction shall be required to participate in the opinion procedures.

Status: Active, referred to Committee on Appropriations June 26, 2006.

WHISTLEBLOWER PROTECTION FOR PUBLIC LAWYERS

AB 1612 (Pavley)

The State Bar Act specifies the duties of an attorney to include the obligation of maintaining the confidentiality of information

disclosed by a client. This bill would have authorized an attorney who, in the course of representing a governmental organization, learns of improper governmental activity to urge reconsideration of the matter and to refer it to a higher authority in the organization.

On June 7, 2006, the bill was gutted. The amendment turned the bill into Workers' Compensation legislation designed to allow medical providers to withdraw their services from a medical provider network established pursuant to Workers' Compensation Law. Versions of the bill had passed both houses previously, only to be vetoed by the Governor. Assembly Member Pavley is termed-out this year, therefore, supporters will need to find another sponsor to carry the legislation if it is to be re-introduced.

ATTORNEY FEES FOR PUBLIC AGENCIES

SB 1818 (ORTIZ)

Under existing law, a court may award attorneys' fees to a successful party against one or more opposing parties in any action that has resulted in the enforcement of an important right affecting the public interest and if a significant benefit has been conferred on the general public or a large class of persons and other conditions are satisfied. With respect to actions involving public entities, this provision applies to allowances against, but not in favor of, public entities. This bill would provide that a public entity may recover attorneys' fees as the prevailing party upon motion to the court if it can show that a significant benefit has been conferred on, or an important principle has been established for the benefit of, the public.

Status: Active, passed Judiciary Committee June 26, 2006.

* Amy Lepine is the principal at the LEPINE LAW GROUP, located in San Diego, California.

Public Law Section Sponsoring Programs at the State Bar Annual Meeting

The Public Law Section will be sponsoring 10 programs at the **State Bar Annual Meeting in Monterey, October 5–8, 2006.** Through the efforts of its Education Subcommittee, the Public Law Section has organized programs with interesting and well-known speakers, and is excited about the caliber of programs being presented. For information on registering for these programs, please visit the State Bar's website at www.calbar.ca.gov/annualmeeting.

Program lineup

When Past and Present Collide: How Archeological Considerations Affect Land Use Decisions
Thursday, Oct 5, 4:45pm - 5:45pm

Obtaining Peace Officer Records
Friday, October 6, 2:15pm - 4:15pm

Employee/Employer Relations: From Managing Leaves of Absence to Mandatory Sexual Harassment Training
Friday, Oct 6, 2:15pm - 4:15pm

Financing Political Campaigns with Public Funds: Meaningful or Marginal Political Reform?
Saturday, Oct 7, 2:15pm - 4:15pm

Supreme Court Confirmation Hearings as Kabuki Dance
Saturday, Oct 7, 4:45pm - 5:45pm

Religion, Public Schools and the Public Work Place
Thursday, Oct 5, 4:45pm - 5:45pm

Making Ethics Work for your Client: Martha Stewart to Arthur Anderson
Thursday, Oct 5, 4:45pm - 5:45pm

Protecting the Appellate Record: Three Ways to Get a Document before the Court of Appeal
Saturday, Oct 7, 4:45pm - 5:45pm

The Emerging Rule of Law in the Former Soviet Republics: Challenges, Opportunities and Prospects for Success
Saturday, Oct 7, 4:45 - 5:45pm

Statewide Constitutional Reform
Sunday, Oct 8, 8:30am - 9:30am

2006 PUBLIC LAWYER OF THE YEAR RECEPTION

You Are Invited

The Public Law Section's Executive Committee cordially invites you to join us and the California State Supreme Court Chief Justice Ronald M. George for the presentation of this year's Public Lawyer of the Year Award.

The Public Law Section is pleased to announce this year's recipient of the Public Lawyer of the Year Award to be

Clara L. Slifkin
Administrative Law Judge

The event will be held at the State Bar Annual Meeting in Monterey.
Date: Friday, October 6, 2006
Time: 4:30 p.m.
Place: Portola Room at the Portola Plaza Hotel

PAST HONOREES
2005: Manuela Albuquerque
2004: Roderick Watson
2003: Ariel Pierre Calonne
2002: Herschel Elkins
2001: Jayne W. Williams
2000: Prudence Kay Poppink
1999: JoAnne Speers
1998: Peter Belton
1997: Andrew Gustafson

Public Law Section members are encouraged to attend and to bring a guest!

2006 Public Lawyer of the Year Sponsorship Opportunities

The Executive Committee of the Public Law Section would like to invite you to become a sponsor of the 2006 Public Lawyer of the Year (PLOY) Award.

The PLOY Award is given annually to a public law practitioner deserving of special recognition because of outstanding public service. The recipient is nominated by his/her peers and the award is usually presented by the Chief Justice of the California Supreme Court at a special reception during the State Bar Annual Meeting. The PLOY Award reception this year will be held October 6, 2006 in Monterey.

Sponsorship carries with it the opportunity to indicate to the legal and judicial community the support of yourself, your firm or your agency in this public service award. Your contribution will defer the cost of nominating and granting the award and will be added to a permanent endowment. The purpose of the endowment is to accumulate monies that will permit investment income to sustain the award.

Sponsors will be recognized as a special guest at the Public Lawyer of the Year reception. Your name and level of sponsorship will appear at the reception, on the State Bar's Annual Meeting list of programs, and in the Public Law Journal. It will also be posted on the Section's website.

A sponsor is recognized by the amount of the contribution:

Bronze Sponsors begin at $250
Silver Sponsors begin at $500
Gold Sponsors begin at $1,000
Platinum Sponsors begin at $5,000

Your contribution is tax deductible and may be sent to:
State Bar Educational Foundation PLOY
Public Law Section
The State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

For more information on the reception or on being a sponsor, please contact Tom Pye by telephone at 415-538-2042, or email him at thomas.pye@calbar.ca.gov.

A Message from the Chair

By Terence R. Boga

Each year the Public Law Section bestows the Public Lawyer of the Year (PLOY) Award on a public law practitioner who deserves special recognition because of outstanding public service. I am pleased to announce that the Executive Committee has selected Administrative Law Judge Clara L. Slifkin as the recipient of the 2006 PLOY Award. Judge Slifkin's impressive legal career includes 30 years of public law practice. Prior to her appointment as an Administrative Law Judge, she served as a deputy attorney general, a deputy public defender for Los Angeles County, and a legislative analyst for the City of Los Angeles. Among other volunteer activities, she currently serves as a Vice President of the Board of the Foundation of the State Bar, and previously served as Vice President and a member of the State Bar's Board of Governors.

The 2006 PLOY Award will be presented by Chief Justice Ronald George at a reception during the State Bar Annual Meeting in Monterey. The reception will take place on October 6, 2006 at 4:30 p.m. at the Portola Plaza Hotel in the Portola Room. I hope very much to see you there as we honor Judge Slifkin for her remarkable record of public service.

Join The Public Law Section

Use this application form. If you are already a member, give it to a partner, associate, or friend.
Membership will help you SERVE YOUR CLIENTS and SERVE YOURSELF now and in the future.

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STATE BAR NO. YEAR OF ADMISSION

MY PRIMARY AREAS OF INTEREST ARE:

OR, ENROLL ME AS:

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❑ STUDENT MEMBER* LAW SCHOOL:_____

***Student membership fee is only $15.00.**

I have enclosed my check for $60* payable to the State Bar of California for a one-year membership in the Public Law Section. (Your canceled check is acknowledgement of membership.)

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